



U.S. Department
of Transportation
**Federal Transit
Administration**

Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

September 8, 2006

Mr. Robert Pfaff
Executive Director
Akron Metro RTA
416 Kenmore Boulevard
Akron, OH 44301

Edward J. Gill, Jr., Esq.
Thompson Coburn LLP
Suite 600
1909 K Street NW
Washington, DC 20006

Gary W. Spring, Esq.
Ms. Karen D. Adinolfi, Esq.
Roetzel & Andress, LPA
222 South Main Street
Akron, OH 44308

Richard P. Schweitzer, Esq.
General Counsel
American Bus Association, Inc.
Richard P. Schweitzer, PLLC
1776 K Street NW
Suite 800
Washington, DC 20006

Re: American Bus Association, Inc. v. Akron Metro Regional Transit Authority,
Charter Service Complaint Docket No. 2005-05;
Appeal from Regional Administrator's Decision

To all parties concerned:

On April 26, 2006, the Federal Transit Administration (FTA) received an appeal by the Akron Metro Regional Transit Authority (Akron) from the March 22, 2006, decision by FTA Regional Administrator Marisol Simon on the complaint filed by the American Bus Association (ABA). For the reasons set forth below, I am not taking action on the appeal; Akron has failed to raise new matters of fact or points of law that were not available or not known during the

investigation of the complaint. Therefore, the Regional Administrator's decision stands. I choose, however, to modify the remedy ordered by the Regional Administrator; I will withhold an amount of Federal financial assistance from Akron that reflects the revenue Akron garnered through its performance of illegal charter bus service.

No New Matters of Fact

Based on the evidence presented on appeal, Akron has not presented evidence that there are new matters of fact that were not available or known during the Regional Administrator's investigation of ABA's complaint.¹ In its appeal, Akron attached the Final Report of FTA's FY2006 Triennial Review of the Metro Regional Transit Authority (Triennial Report).² The Triennial Report does not indicate any new facts ranging from 2002 to mid-2005 that differed from the facts the Regional Administrator found during her investigation of ABA's complaint. Furthermore, based on the facts extracted from each investigation, both investigations produced findings of charter service violations by Akron.³

Akron also cites FTA's 1997, 2000, and 2003 triennial reviews to support its argument that it complied with the charter bus regulations.⁴ Since those reviews were part of the Regional Administrator's investigation, they do not provide new facts sufficient to support this appeal.

Likewise, certain additional facts adduced by Akron, such as (1) Akron's operating expenses and revenues;⁵ (2) statements regarding Akron's relationship with Vance Charters;⁶ (3) the box of documents ABA provided FTA which contained Akron's "Charterbus Order" forms;⁷ (4) the Akron Beacon Journal article;⁸ and (5) other ABA statements and allegations regarding Akron's relationship with Vance Charters⁹ were all dated or occurred before the Regional Administrator's decision, and as such, these facts were both available and known to the Regional Administrator throughout her investigation.

No New Points of Law

Based on the evidence presented on appeal, Akron has not presented evidence that there are new points of law that were not available or known to the Regional Administrator during her investigation of ABA's complaint. Akron cites several charter bus regulations in support of its

¹ See 49 CFR 604.19(b).

² See Attachment A, Respondent Akron Metro Regional Transit Authority's Appeal to the Deputy Administrator of the Federal Transit Administration from the Regional Administrator's Decision, Am. Bus Ass'n, Charter Service Docket No. 2005-05 (Fed. Transit Admin. Region V Apr. 27, 2006) [hereinafter Attachment A].

³ See Am. Bus Assoc., Inc., at 11 (2006) (Decision on file with FTA) (holding Akron violated FTA charter service regulations); Attachment A, *supra* note 4, at 7 ("During [the FY2006] Triennial Review of METRO, deficiencies were found with the FTA requirements for charter bus.").

⁴ Respondent Akron Metro Regional Transit Authority's Appeal to the Deputy Administrator of the Federal Transit Administration from the Regional Administrator's Decision at 15-18, Am. Bus Ass'n, Charter Service Docket No. 2005-05 (Fed. Transit Admin. Region V Apr. 27, 2006) [hereinafter Brief for the Appellant].

⁵ Brief for the Appellant, *supra* note 7, at 2.

⁶ Brief for the Appellant, *supra* note 7, at 21.

⁷ Brief for the Appellant, *supra* note 7, at 22.

⁸ Brief for the Appellant, *supra* note 7, at 22.

⁹ Brief for the Appellant, *supra* note 7, at 22.

argument that new points of law exist, but all of the cited regulations were promulgated by FTA before this dispute, and thus, these regulations do not identify new points of law.

Akron cites the enactment of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) and the adoption of its accompanying Conference Report of the Committee of Conference on H.R. 3 as a new point of law in support of its appeal. President Bush signed SAFETEA-LU into law on August 10, 2005, which is nearly seven months before the Regional Administrator's decision. Plainly, the SAFETEA-LU charter service provisions were available and known to the Regional Administrator before she made her decision. Similarly, Akron's reference to a series of FTA charter service decisions that were issued before the Regional Administrator's decision is without merit because those cases were also known and available to the Regional Administrator when she issued her decision.

Finally, in support of its appeal, Akron cites the current discussions amongst the negotiated rulemaking advisory committee that FTA convened to obtain advice on how to implement the charter service provisions of SAFETEA-LU. As yet, however, that committee has not provided any recommendations to FTA, nor has FTA promulgated any new rules on charter service. The work of the negotiated rulemaking advisory committee is immaterial to Akron's appeal.

Remedy

Although I am upholding the Regional Administrator's decision on the merits of the ABA's complaint, I am modifying the remedy she ordered.¹⁰ The Regional Administrator's decision sets out very clearly that Akron engaged in a pattern of violations of its charter service agreement by performing charter service that was not in accordance with the charter bus regulations. The Regional Administrator correctly points to section 11 of the FTA Master Agreement as authority to "terminate all or any part of the Federal assistance . . ." I believe it is appropriate to reduce the withholding amount imposed in the Regional Administrator's decision from \$622,500 to \$415,325.16, which represents the amount Akron garnered by performing the services at issue. I emphasize, however, that this reduction of the withholding amount in no way negates the findings of fact or the merits of the Regional Administrator's decision.¹¹ Rather, it

¹⁰ I do so in accordance with the FTA Delegations of Authority, FTA Order 1100.50D, Section I-1(1)(a). As Federal Transit Administrator, I have inherent authority over the policy and direction of FTA that supersedes the authority delegated to the Regional Administrator. In this instance, in my discretion, I am adjusting the remedy ordered by the Regional Administrator in an exercise of my inherent authority to oversee and direct FTA policy. *See, Puerto Rico Maritime Shipping Authority v. Dole*, 619 F.Supp. 312, 317 (D.C. 1985)(vacated on other grounds) ("Overriding authority in matters of transportation policy" permits the Secretary to exercise oversight power despite day-to-day administration duties to the Administrator.)

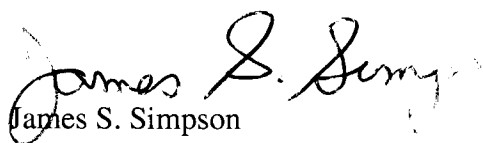
¹¹ My modification of the remedy ordered by the Regional Administrator is not "action" under 49 CFR 604.19(b). At any point in a proceeding, FTA has discretion to waive or modify its procedural rules provided such a waiver or modification does not affect a party's substantive rights. *E.g., American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970)("It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.") In this instance, 49 CFR 604.19(b) is a regulation that aids FTA in the administration of appeals; Akron cannot reasonably argue the reduction of the withholding amount has substantially prejudiced its case.

serves as notice to other transit agencies that FTA will not allow the use of federally funded assets to earn revenue that contravenes the provisions of the charter bus regulations.

Final Administrative Decision

The Regional Administrator's decision stands. The remedy imposed in that decision, however, is reduced from a withholding amount of \$622,500 in Federal financial assistance to a withholding amount of \$415,325.16, which represents the revenue garnered by Akron when it performed illegal charter bus services. My decision is administratively final.

Sincerely,


James S. Simpson